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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 473

JOHN D. PENNEKAMP AND THE MIAMI HERALD PUBLISHING COMPANY,

Petitioners,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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THE STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

John D. Pennekamp and The Miami Herald Publishing Company respectfully petition for a writ of certiorari to the Supreme Court of Florida to review a decree of said Court entered on July 24, 1945 (R. 152-172), affirming a judgment of the Circuit Court of the Eleventh Judicial Circuit of Florida entered on December 18, 1944 (R. 142-145) holding petitioners guilty of contempt of the Circuit Court of the Eleventh Judicial Circuit of Florida and fining petitioner

John D. Pennekamp $250 and petitioner The Miami Herald Publishing Company $1,000.

The opinion of the Circuit Court (R. 142-145) and of the Supreme Court of Florida (R. 152-172) are as yet unreported.

A

Statement of the Matters Involved

Petitioner The Miami Herald Publishing Company is the publisher of The Miami Herald, a daily newspaper of more than 125,000 circulation published each day at Miami, Florida. Petitioner John D. Pennekamp is the Associate Editor of The Miami Herald.

On November 2, 1944, The Miami Herald printed an editorial and a cartoon in its newspaper published that day. The editorial was entitled "Courts are Established for the People" (R. 6-8). The cartoon was entitled "But Judge" (R. 8a).

On November 7, 1944, The Miami Herald printed an editorial in its newspaper published that day entitled "Why People Wonder" (R. 9).

The editorials dealt with law enforcement generally and mentioned three cases that had been disposed of by the court.

The editorial printed on November 2 referred to two cases in which motions made by counsel for the defense were granted. One motion was to deny a temporary injunction; the other to dismiss a bill of complaint for an injunction where a temporary injunction previously had been ordered by another judge. Both cases involved notorious gambling joints, one of which in an earlier case had obtained an order of dismissal from Judge Barns, one of the accusing judges herein. The original suit was brought in 1940 by the Attorney General of Florida, the State Attorney of Dade

County and the County Solicitor of Dade County. The defendants in this case in their answer frankly admitted they had violated the gambling laws of Florida and asserted they had done so in the belief such violations met with the approval of the local enforcement officers. They promised to put an end to such violations for all time and asked the court to refuse an injunction.

This Judge Barns did.

In January, 1941, there was a change in the office of Attorney General of Florida.

On April 28, 1941, the new Attorney General filed a motion asking leave of the court to withdraw from the case and to take such further action as it deemed appropriate in the premises.

Judge Barns dismissed the case on May 12, 1941, stating that "in litigation it is necessary to have a plaintiff and a defendant, and the plaintiff not desiring to proceed further and having withdrawn" the case was ordered dismissed.

The file of the case contains no motion for withdrawal by the other relators,—the Assistant Attorneys General, the State Attorney of Dade County, or the County Solicitor of Dade County. (R. 53-54.) The statute provided for maintenance of the suit by anyone, indeed any taxpayer (Florida Stats. 1941, Sec. 64.11).

Then in 1944 a new State Attorney initiated another proceeding in chancery against the Brook Club and its owner. In his bill of complaint he recited pertinent portions of the answer filed in the proceedings initiated in 1940 to the same end, namely to abate the nuisance gambling, wherein the defendants admitted violations of law and promised to put a stop to them. Evidence as to later violations, following those admissions and promises, was furnished the court. A preliminary injunction was issued by Judge Holt.

Months later defendants moved to dismiss. The hearing

on the motion was held in the absence of the State Attorney, who could not be present because of his duties before the Grand Jury. An order vacating the preliminary injunction and dismissing the complaint was entered by Judge Wiseheart, one of the accusing judges herein on the ground that no testimony had been offered, although such testimony had been taken in open court before Judge Holt.

The other case referred to in the editorial printed in The Miami Herald on November 2 was known as The Teepee Club case. The Teepee Club was a notorious gambling joint. The record showed numerous previous violations by The Teepee Club and at least two convictions of its operators. The Grand Jury in its report on law violations during this period referred to the records of the Criminal Court of Record for Dade County showing widespread gambling under protection and a fantastic record of the offenders escaping punishment.

On September 23, 1944, a bill of complaint to padlock the Teepee Club for bookmaking was filed in the Circuit Court. It was a chancery proceeding, not a criminal proceeding. The State Attorney who filed the bill of complaint supported it with affidavits of six men who were in the place at the time it was raided by two deputy sheriffs. On October 11, counsel for one defendant moved to suppress the testimony obtained because it was in the form of affidavit testimony taken before a reporter, then subscribed and sworn to by the witness. On October 11, Judge Holt denied the application for a temporary injunction stating that the State had failed to prove its case by competent evidence. He castigated the use of affidavits although the state statute under which the injunction was sought expressly authorized the use of affidavits (Florida Stats. 1941, Sec. 64.12). On the same day the State Attorney filed a motion to set aside the order denying the tem-

porary injunction and renewing his motion for a temporary injunction. The State Attorney contended that under the statutes of Florida evidence obtained by affidavit was good for temporary injunction purposes and supported his motion with various precedents in court decisions. On October 12, Judge Holt denied the motion to set aside the order denying the temporary injunction. The editorial of November 2 commented on this order of Judge Holt (R. 8).

The third reference to proceedings before the Circuit Court read as follows:

> "This week the people through their Grand Jury brought into the Court eight indictments for rape. Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn. Back they went to the Grand Jury for representation to the Court."

Counsel for one of the defendants in these rape cases moved to quash the indictment of his client on the ground that it was defective. The indictment was quashed[1] (R. 11; 55).

The cartoon entitled "But Judge" printed by The Miami Herald in its issue of November 2 contains the figure of a man in the robes of a judge sitting at the bench with the words "The Law" on the back of his chair. At his left

[1] It is significant in this respect that petitioners in the citation for contempt are accused of willfully and wantonly withholding the full truth from the public and failing to fairly report the action of the court and the judge thereof in respect of said indictments by stating only "that 'Judge Paul D. Barns agreed with the defense that the indictments were not properly drawn' withholding the truth by failing to state the act of the representative of the State Attorney's office." The minutes of the court on the day the motion to quash was granted did not show any concurrence in the motion by the representative of the State Attorney's office (R. 55). The minutes were subsequently modified by Judge Barns to show such concurrence (R. 137). The Assistant State Attorney present at that time in an affidavit filed for use in the Supreme Court of Florida denied concurring in the motion. The Miami Herald published a factual story concerning the reinglictment of the defendants when they were reindicted. (See footnote infra p. 9.)

there is the figure of a man grinning with pleasure as he receives from the judge a paper on which the words "Defendant Dismissed" appear. At the right of the judge there is a figure of a small man on whose back are printed the words "Public Interest".

The editorial printed on November 7 was entitled "Why People Wonder". It referred to the Brook Club padlock case dismissed by Judge Wiseheart in the absence of the State Attorney and to another case in which a bus driver was sentenced to 15 days in City Jail by Judge Curry on conviction of beating up a taxicab operator. The arrest of the bus driver precipitated a strike. The driver filed an appeal, posted a $200 appeal bond and the case never proceeded further. The editorial concluded with this statement:

> "There you have the legal paradox, working two ways, but to the same purpose against prosecution. Speed when needed. Month after month of delay when that serves the better."

On November 10, 1944, Judges Paul D. Barns and Marshall C. Wiseheart issued over their signatures from the Circuit Court of the Eleventh Judicial Circuit of Florida a paper entitled "Citation for Contempt" addressed to John D. Pennekamp and The Miami Herald Publishing Company. This citation was not sworn to or verified in any manner. The citation alleged that the two editorials and the cartoon—

> "did reflect upon and impugn the integrity of said Court and the Judges thereof in imputing that the Judges of said Court 'do recognize and accept, even go out to find, every possible technicality of the law to protect the defendant, to block, thwart, hinder, embarrass and nullify prosecution,' which said acts by you tend to create a distrust for said court and the judges

thereof in the minds of the people of this county and state and *tend to prevent and prejudice a fair and impartial action of the said Court and Judges thereof in respect to the said pending cases*" (R. 2). (Emphasis supplied.)

No allegation is to be found anywhere in the citation that either of the editorials or the cartoon created a clear and present danger of high imminence to the fair and impartial administration of justice in pending cases before either of the judges signing the citation.

Petitioners were commanded to appear at 10:00 A. M., November 28, 1944, to show cause why they should not be held and adjudged to be in contempt.

Petitioners filed a return to the citation wherein they moved to quash and also wherein they answered the charges of the judges (R. 9-19). Petitioners moved to quash on the following grounds:

1. The Court was without jurisdiction to issue said citation.

2. The said citation was not verified by any person and was not issued in form and manner required.

3. The publications mentioned in said citation were not contemptuous.

4. The publications upon which said citation was based constituted legitimate criticism and comment within the guaranties of Section 13 of the Declaration of Rights of the Constitution of Florida.

5. The publications upon which said citation was based constituted legitimate criticism and comment within the guaranties of the First and the Fourteenth Amendments to the Constitution of the United States.

6. The publications complained of created no clear and present danger to the administration of justice.

In petitioners' answer, supported by affidavits, petitioner John D. Pennekamp admitted responsibility for the publication of the editorials and cartoon complained of by the judges but denied that the editorials and cartoon created a clear and present danger to the orderly administration of justice in the court. Affirmatively it was alleged that said editorials and said cartoon were "intended to be and in fact were published in the interest of orderly and fair administration of justice in Dade County", which affirmation was more fully set forth and supported in affidavits of petitioner Pennekamp (R. 47-50) and Jeanne Bellamy Bills (R. 50-57) attached to the answer and asked to be read as a part thereof.

Petitioners also attached to their answer and asked that it be read as a part thereof a report of the Grand Jury of the Circuit Court of Dade County, Florida, dated November 13, 1944 (a few days after the editorials), calling attention to the breakdown in law enforcement, to the widespread existence of illegal gambling activities in Dade County and to the danger which these conditions engender (R. 19-47).

Hearing was held before Judges Barns and Wiseheart on November 29, 1944. At the outset of the hearing the Judges offered to recuse themselves if petitioners expressed a desire to that end. Petitioners declined to make any suggestion whatever as to the constitution of the court or as to who should sit upon the trial of the case whereupon the accusing judges sat (R. 127-128).

On December 9, 1944, Judges Barns and Wiseheart entered an order denying petitioners' motion to quash the citation for contempt (R. 127-133). On December 15, 1944, Judges Barns and Wiseheart filed a statement of findings

of fact (R. 133-142). On December 18, 1944, Judges Barns and Wiseheart entered a judgment of guilt (R. 142-145).

The Circuit Court in its order said, inter alia:

> "John D. Pennekamp and The Miami Herald Publishing Co., and each of them, are and stand guilty of contempt of the Circuit Court of the Eleventh Judicial Circuit of Florida for making an unfair and untrue report of court proceedings and in turn of making false imputations against the Court and its Judges as such based upon respondents' own unfair and untrue report as appears more fully from the citation and the Court's records;"

Appeal from the judgment of the Circuit Court was duly filed to the Supreme Court of Florida where hearing was held by the full court on May 4, 1945.[2]

---

[2] Due to uncertainty under Florida procedure as to correct method of review, the case was taken from the lower court to the Florida Supreme Court both on certiorari (*John D. Pennekamp and The Miami Herald Publishing Company, Petitioners*, v. *The Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, Respondent*) and by appeal (*In Re: John D. Pennekamp and The Miami Herald Publishing Company, Appellants*). The records were identical except that attached to petition for writ of certiorari were the following exhibits not appearing in the appeal record:

1. Photostatic copy of the minutes made by the Clerk of the Circuit Court in Dade County at the time of the ruling (Ex. 1) on the rape indictments which made no reference to the matters charged in the citation and in the judgment as a wilful suppression of fact. These were the only minutes that existed when the editorial was published.

2. Photostatic copy of the minutes of the Circuit Court as later expanded at the direction of Judge Barns after the publication of the editorial and cartoon (Ex. 2).

3. Affidavit of Assistant State Attorney (Ex. 3) stating that he did not concede that the indictments in the rape cases were defective but, because the Grand Jury was still in session and to obviate any question, he would have new indictments returned.

4. Photostatic copy of newspaper item in the Miami Herald of November 1st stating the rape defendants had been duly reindicted and arraigned for trial (Ex. 4).

On February 27, 1945, the Florida Supreme Court ruled that although certiorari or habeas corpus had theretofore been the accepted method of review, that appeal was in this case the proper method.

On July 24, 1945, the Supreme Court of Florida by a five to two vote affirmed the judgment of contempt entered by the Circuit Court (R. 152-172).

The Supreme Court of Florida divided on the issue as to whether the decision of this Court in the case of *Bridges* v. *California*, 314 U. S. 252 (1941), is binding upon the courts of Florida. The majority of the Supreme Court of Florida in an opinion written by Mr. Associate Justice Terrell and concurred in by Chief Justice Chapman and Associate Justices Brown, Thomas and Adams held that the rule laid down in the *Bridges* case was not applicable to this case and that the cartoon and the editorials

> "afford ample support for the judgment imposed and that the issues were properly adjudicated under Florida law."

A dissenting opinion filed by Mr. Associate Justice Buford and concurred in by Mr. Associate Justice Sebring declared there was nothing in either of the editorials or cartoon which

> "imputes a want of fairness, impartiality or integrity to any Judge or any Court. Nor do they appear to have for their purpose or intent the influencing or controlling the determination of the result in any particular case *then pending* in any court. They appear to adversely criticise a judicial system which, to protect the rights of the righteous must, by the same token, see that the alleged rights of the unrighteous are determined."

Mr. Justice Buford in his dissent also said:

> "• • • I think the Bridges case is binding and that in the absence of showing of *clear* and *present danger* of influencing or controlling the determination in any particular case, then pending in any court, created by the publication complained of, no punishable contempt is made to appear." (Emphasis as it appears in dissenting opinion.)

B

Jurisdiction

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended; 28 U. S. C., Sec. 344(b). The decree of the Supreme Court of Florida to be reviewed was entered on July 24, 1945.

C

Constitutional and Statutory Provisions Involved

The constitutional provisions involved are the First and the Fourteenth Amendments to the Constitution of the United States and Sec. 13 of the Declaration of Rights of the State of Florida.

The statutory provisions involved are Sec. 2.01 of the Florida Statutes of 1941 incorporating the Common Law of England down to July 4, 1776, where not inconsistent with the Constitution and Laws of the United States and the acts of the Florida Legislature, into the laws of Florida and Secs. 38.22 and 38.23 of the Florida Statutes of 1941 defining contempt of court. Also Secs. 64.11 and 64.12 of the Florida Statutes of 1941.

For the convenience of the Court the constitutional and statutory provisions are set forth in Appendix A attached to this petition.

D

Question Presented

Whether in a contempt proceeding instituted by state court judges for the purpose of punishing a newspaper and its associate editor for publishing editorials and a cartoon that annoyed the judges, state courts are required to follow the rule laid down by this Court for all courts, state and federal and including this Court, that there must be shown a

clear and present danger of high imminence to the administration of justice by the court before there can be a judgment of guilt with resultant punishment.

E

Reasons Relied On for the Allowance of the Writ

1. *The decision of the Supreme Court of Florida in this case is in conflict with the decision of this Court in Bridges* v. *California, supra, and with state court and federal court decisions adhering to the test laid down in the Bridges case.*

As was pointed out in the dissenting opinion, the decision of the Florida Supreme Court in this case is in conflict with this Court's decision in the *Bridges* case and with the decision of the Supreme Court of Louisiana in *Graham* v. *Jones in re Times Picayune Publishing Company*, 200 La. 137; 7 So. (2d) 688. It is also in conflict with *People of Virgin Islands v. Broadhurst*, 148 F. (2d) 636 (C. C. A. 3rd, 1945). The Florida Supreme Court by its challenge of this Court's decision in the *Bridges* case has raised an important question in the application of the law of contempt by publication that should be decided by this Court. Since the *Bridges* case, the Florida Supreme Court is the only state court of last resort to challenge that decision.

2. *The action by the Supreme Court of Florida was arbitrary and capricious and should be reviewed by this Court.*

The record in this case shows that the citation upon which hearing was held, with resulting conviction and judgment affirmed by the Supreme Court of Florida nowhere alleged that the acts of petitioners created any clear and present danger of high imminence to the fair and impartial administration of justice. All that the citation alleged was that the acts of petitioners "*tend to prevent and prejudice a fair and impartial action of the said Court and Judges thereof in*

respect to the said pending cases." The record is indisputable that none of the cases discussed in the editorials was pending. The Brook Club case had been dismissed by Judge Wiseheart. The Teepee Club case had been disposed of by Judge Holt on the only issue in that case presented to him. The indictments in the rape cases had been quashed by Judge Barns. The refusal of the Florida Supreme Court to recognize these facts and to reverse the judgment on appeal was arbitrary and capricious and should be reviewed by this Court.

3. *The holding of the Supreme Court of Florida that the convictions affirmed do not violate the constitutional guaranty of a free press is in conflict with the decisions of this Court in Near* v. *Minnesota*, 283 U. S. 697 (1931); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Bridges* v. *California*, *supra*; *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943).

All of the foregoing cases related in one way or another to restraint of free speech or the free press. Each of them affirms the special place which these liberties hold in the American scheme of government and affairs. The decision of the Florida Supreme Court in effect reinvokes the ancient English common law concept of the right of judges to punish those whose utterances whether spoken or printed and circulated outside of the immediate presence of the court annoy them. This Court has said in no uncertain terms that the English common law is inapplicable in this country on questions concerning liberty of speech and press. It has also said:

> "The fact that the liberty of press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous

restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege." *Near* v. *Minnesota*, 283 U. S. at 719.

The procedure invoked by the Circuit Court judges in this case resulting in the conviction and punishment of petitioners and affirmed by the Supreme Court of Florida is repugnant to the constitutional guaranty of a free press and should be reviewed by this Court.

WHEREFORE, your petitioners pray that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of Florida, to the end that this cause may be reviewed and determined by this Court; that the decree of the said Supreme Court be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Preliminary Statement

The opinions below, the statement of the matter involved, jurisdiction, and the question presented appear in the Petition for a Writ of Certiorari herein and in the interest of brevity are incorporated here by reference.

II

Summary of Argument

Point 1. The decision of the Supreme Court of Florida upholding the conviction of petitioners for contempt in a

proceeding based upon an allegation that petitioners' utterances merely tended to prevent and prejudice a fair and impartial action of the court and the judges thereof is in conflict with the decision of this Court in *Bridges* v. *California*, 314 U. S. 252-305 (1941), and with state and federal court decisions adhering to the test laid down in the *Bridges* case. In effect the Supreme Court of Florida has challenged the application of the *Bridges* case to contempt proceedings intituted by judges in that state and has ruled that such proceedings are properly settled under the laws of Florida without reference to the holding of this Court. If the decision of the Florida Supreme Court is not reviewed and set aside by this Court then the whole purpose of the *Bridges* case to lay down a test applicable to both state and federal courts will have been defeated.

Point 2. The record in this case shows that the citation upon which hearing was held with the resulting conviction of petitioners which conviction was affirmed by the Supreme Court of Florida nowhere alleged that the acts of petitioners created any clear and present danger of high imminence to the fair and impartial administration of justice. The record is indisputable that none of the cases discussed in the editorials was pending before the Court at the time the editorials were printed. The refusal of the Florida Supreme Court to recognize these facts and reverse the judgment on appeal was arbitrary and capricious.

Point 3. The holding of the Supreme Court of Florida that the convictions affirmed do not violate the constitutional guaranty of a free press is in conflict with the decisions of this Court in *Near* v. *Minnesota*, 283 U. S. 697 (1931); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *DeJonge* v. *Oregon*, 299 U. S. 353 (1937); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Lovell* v. *Griffin*, 303 U. S. 444 (1938);

Cantwell v. Connecticut, 310 U. S. 296 (1940); *Bridges v. California*, supra; *Murdock v. Pennsylvania*, 319 U. S. 105 (1943). Each of these cases related in one way or another to restraint of free speech or the free press. Each of them held that these liberties cannot be restrained. This Court has held that subsequent punishment for abuses as may exist is the appropriate remedy consistent with constitutional privilege. The procedure invoked by the Circuit Court judges in this case resulting in the conviction as affirmed by the Supreme Court of Florida is repugnant to the guaranty of a free press.

III

ARGUMENT

Point 1

The decision of the Supreme Court of Florida in this case is in conflict with the decision of this Court in Bridges v. California, supra, and with state court and federal court decisions adhering to the test laid down in the Bridges case.

In *Bridges v. California*, this Court measured a power of all American courts, both state and federal. It said that the possibility of disrespect for the judiciary as the result of the published criticism of a judge is not such a substantive evil as will justify impairment of the constitutional right of freedom of speech and press.

For all time it disposed of the contention that the English common law is applicable on questions concerning liberty of speech and the press.

Further it reaffirmed the decision in *Nye v. United States*, 313 U. S. 33 (1941), overruling *Toledo Newspaper Company v. United States*, 247 U. S. 402 (1918). The *Toledo* case applied the reasonable tendency test. The *Nye* case ruled flatly that courts have power to punish for contempt

only where there is a clear and present danger of high imminence.

A tendency to obstruct was all that was alleged in the citation directed to petitioners. It was upon that charge and that charge alone they were convicted and their conviction affirmed by the Supreme Court of Florida.

The Supreme Court of Florida in its opinion in addition to challenging this Court's decision in the *Bridges* case also challenged this Court's holding that the Fourteenth Amendment prohibits infringement by state legislatures of those rights and liberties guaranteed against infringement by Congress in the federal constitution (R. 166). After so asserting its challenge, the Florida Court said:

> "It necessarily follows that the only question that can properly be raised here goes to the reasonableness, arbitrariness or the discriminatory character of the contempt judgment or the Florida law under which it was imposed. This question appellants (petitioners herein) have by-passed and have elected to stand on their immunity from punishment under the Fourteenth Amendment." (R. 166.)

The court concluded its opinion by saying:

> "We therefore hold that the cartoon and the editorials afford ample support for the judgment imposed and that the issues were properly adjudicated under Florida law. We do not think that the rule in the Bridges case is applicable but if for any reason it may be held to be, the judgment is still free from error because it is not charged that it was applied in an arbitrary or unreasonable manner and if it were, there is no showing to that effect. We do not think freedom of the press can be exercised in a way to vitiate fair and impartial trial nor do we think that it can be employed to harass the court or in total disregard of approved standards of propriety when the rights of others to the cause are adversely affected." (R. 171.)

Two judges of the Florida Supreme Court refused to concur in the decision. In a dissenting opinion they said—

> "• • • there is nothing in either (the editorials and cartoon) which imputes a want of fairness, impartiality or integrity to any Judge or any Court. • • • They appear to adversely criticise a judicial system which, to protect the rights of the righteous must, by the same token, see that the alleged rights of the unrighteous are determined." (R. 171.)

The dissenting judges insisted the rule in the *Bridges* case is binding and should be applied.

As for the Florida law, it contains no definition of contempt by publication (See Sec. 38.23 of the Florida statutes of 1941). The Florida statutes do provide, however, that the common law of England down to July 4, 1776, shall be in force in Florida provided it is not inconsistent with the Constitution and laws of the United States and the Acts of the legislature of Florida. (Sec. 2.01 Florida Statutes, 1941).

Thus it was under the ancient English common law that petitioners were cited, convicted and their conviction affirmed by the Florida Supreme Court and in conflict with this Court's decision in *Bridges* v. *California, supra,* and with the state and federal court decisions hereinbefore cited. That conflict should be resolved by this Court.

Point 2

The action by the Supreme Court of Florida was arbitrary and capricious and should be reviewed by this Court.

The action by the Supreme Court of Florida was arbitrary and capricious. It was aimed at enforcing silence in the name of preserving the dignity of the bench. It must be recalled that the editorials and cartoon referred to no

matters pending at the time they were published. The Brook Club case had been dismissed by Judge Wiseheart; the Teepee Club case had been disposed of when the application for temporary injunction was denied by Judge Holt; the rape indictments had been quashed by Judge Barns.

The citation didn't even allege that the comments of petitioners created any clear and present danger of high imminence to the administration of justice. The Florida Supreme Court recognized this and in so doing revived the ancient English common law concept of the power of judges to punish summarily for contempt in order to affirm the convictions. It sought to set up one rule for judges; another one for all other public officials who consider themselves injured by newspaper comment.[3]

What the Florida Supreme Court has done in effect is to say to this Court:

> "In Florida, judges have the right and may exercise the power if they so desire, to punish any one in

[3] As an illustration of the capricious and arbitrary length to which the Florida court went, reference is made to this statement in the majority opinion:

> "We have searched the text books and the cases diligently and we find nothing to support the contention of one of counsel for appellants that freedom of the press protects him if he chooses to lie about the court and that the court can do nothing about it unless he lies in the courtroom or his lying is 'manifested with such a high degree of imminence as to express a high degree of threat'."

The record contains no justification for that statement. Counsel made no such contention. Judge Barns in putting the questions to him said he asked them without application to petitioners herein and merely academically. The purpose of the questions obviously was to force counsel into an admission that judges have greater rights than other public officials in respect of criticism of their actions. Counsel's replies were that they have no greater, no lesser rights; and whether the articles complained of were true or false, judges had to respect the constitutional guaranties and avail themselves of the appropriate remedy. No sweeping claim of absolute immunity for the press was advanced. The remedy of subsequent punishment was fairly stated as the one to be applied when abuses actually occurred. (R. 58-61.)

a contempt proceeding whose comment concerning their activities annoys them. The First Amendment, and the Fourteenth Amendment to the Constitution of the United States do not apply in Florida. The decisions of the Supreme Court of the United States have no binding force and effect upon the courts of Florida."

As against this position this Court has said:

"* * * The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion and contempt much more than it would enhance respect. * * *

"* * * The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting hall, the radio and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases." *Bridges* v. *California*, 314 U. S. at pp. 270-271.

The refusal of the Florida Supreme Court to recognize the effect on Florida courts of the provisions of the First and the Fourteenth Amendments as construed by this Court was arbitrary and capricious. Its judgment should be reviewed.

Point 3

The holding of the Supreme Court of Florida that the convictions affirmed do not violate the constitutional guaranty of a free press is in conflict with the decisions of this Court in Near v. Minnesota, supra; Grosjean v. American Press Co., supra; DeJonge v. Oregon, supra; Herndon v. Lowry, supra; Lovell v. Griffin, supra; Cantwell v. Connecticut, supra; Bridges v. California, supra; Murdock v. Pennsylvania, supra.

Each of the foregoing cases had to do in one way or another with restraint of free speech or free press.

This Court has held that subsequent punishment for such abuses as may exist in respect of comment upon the actions of public officials—including judges—is the appropriate remedy consistent with constitutional privilege.

This remedy was not invoked. Contrary to the provisions of the Fourteenth Amendment, and to the decisions of this Court, the complaining judges asserted the power to punish petitioners in a proceeding the very nature of which has been condemned by this Court. The procedure they invoked was repugnant to the guaranty of a free press contained both in the state and federal constitutions. The convictions resulting should have been set aside by the Supreme Court of Florida in harmony with this Court's decisions. Its judgment affirming the convictions below is repugnant to the constitutional guaranties and should be reviewed by this Court.

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Constitutional Provisions Involved

The First Amendment to the Constitution of the United States provides that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 13 of the Declaration of Rights of the State of Florida provides that:

> "Every person may fully speak and write his sentiments on all subjects being responsible for the abuse of that right, and no laws shall be passed to restrain or abridge the liberty of speech, or of the press."

Statutory Provisions Involved

Section 2.01, Florida Stats. 1941, is as follows:

> "2.01. Common Law and certain statutes declared in force.—The common and statute laws of England which are of a general and not a local nature, with the exception hereinafter mentioned, down to the fourth day of July, 1776, are declared to be of force

in this state; provided, the said statutes and common law be not inconsistent with the constitution and laws of the United States and the acts of the legislature of this state."

Sections 38.22 and 38.23, Florida Stats. 1941, read as follows:

"38.22. Power to punish.—Every court may punish contempts against it, but the punishment imposed by a justice of the peace shall not exceed twenty dollars fine or twenty-four hours imprisonment."

"38.23. Contempts defined.—A refusal to obey any legal order, mandate or decree, made or given by any judge either in term time or in vacation relative to any of the business of said court, after due notice thereof, shall be considered a contempt, and punished accordingly. But nothing said or written, or published, in vacation, to or of any judge, or of any decision made by a judge, shall in any case be construed to be a contempt."

Sections 64.11 and 64.12, Florida Stats. 1941, read as follows:

"64.11. Abatement of nuisance; parties, by whom maintained.—Whenever any nuisance as defined in Sec. 823.05 is kept, maintained or exists, the state's attorney, county solicitor, county prosecutor, or any citizen of the county through any attorney he may select, may maintain his action by a bill in chancery in the proper court in the name of the State of Florida upon the relation of such attorneys or citizen to enjoin said nuisance, the person, or persons conducting or maintaining the same and the owner or agent of the building or ground upon which said nuisance exists."

"64.12. Abatement of nuisances; temporary injunctions.—In such action the court, judge or court commissioner before whom the bill may be brought may upon proper proof being made allow a temporary writ of injunction without bond. If it shall appear to the

satisfaction of the court, judge or court commissioner *by evidence or by affidavit* that a temporary injunction shall issue, the court, judge or court commissioner may in his discretion pending the determination of the bill of a final hearing enjoin (1) the conducting or maintaining of a nuisance; (2) the operating and maintaining of the place or premises where the nuisance is conducted or maintained; (3) the owner or agent of the building or ground upon which the nuisance exists; (4) and the conduct, operation or maintenance of any business or activity operated or maintained in the building or on the premises in connection with or incident to the conducting or maintenance of the nuisance. Such injunction order shall definitely specify the activities enjoined and shall not preclude the operation of any lawful business not conducive to the maintenance of the nuisance complained of. At least three days notice in writing shall be given defendant or defendants of the time and place of application for said temporary injunction." (Emphasis supplied.)